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No. 04-748

IN THE

Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Petitioner,

v.

ADAM BARBOUR, and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress exceed its Spending Clause powers where there is insufficient nexus between federal transportation appropriations and the requirement contained in the Civil Rights Remedies Equalization Act, that states waive their Eleventh Amendment immunity from suit for claims of employment discrimination?

2. Can a waiver of immunity be effective without knowing action by the state; and, if knowledge is required, did WMATA act knowingly when it accepted federal grants for FY 1998?

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INTRODUCTION

This Petition for Certiorari should be granted because the court below failed to correctly apply the criteria for determining whether a statute trenching upon state Eleventh Amendment immunity may be upheld as a Spending Clause enactment. The D.C. Circuit incorrectly analyzed the degree of the nexus needed between the restriction, here waiver of immunity, and the Congressional interest in the appropriations, here capital grants for mass transit. As the requirement was applied by the D.C. Circuit, Congress has virtually unfettered authority to impose any policy goal it wishes to promote, by conditioning state acquiescence to the program in some spending program. This is contrary to the standards enunciated in *South Dakota v. Dole*, 483 U.S. 203 (1987). The D.C. Circuit erred because it failed to analyze the purpose of federal transit appropriations.

Alternatively, the Petition for Certiorari should be granted because it is needed to resolve a conflict in the circuits regarding the conditions necessary for a successful waiver of immunity by the states. There is a split in the circuits regarding the necessity of a finding that waiver of Eleventh Amendment immunity was made knowingly. *Compare Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004) (App. 9a), *with Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001). The D.C. Circuit erroneously held that the sole consideration was whether Congress had made the waiver requirement explicit. There is a split in authority regarding whether the state of the law at the time a grant is sought must be considered in analyzing whether a state has knowingly waived its immunity. The petition for certiorari should be granted to resolve the split in authorities and to make clear that the voluntariness of a state's action should

be analyzed separately from consideration of whether Congress has explicitly made known its intentions.

OPINIONS BELOW

The District Court opinion was not reported and is attached to this petition. App. 34a. The split decision of the United States Court of Appeals for the District of Columbia Circuit is reported as *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004) and is also attached to this petition. App. 1a. The order denying WMATA's Motion for Rehearing/Rehearing en banc is attached to this petition. App. 49a.

STATEMENT OF JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The opinion of the District of Columbia Circuit was issued on July 9, 2004. A timely petition for rehearing/rehearing en banc was filed on August 23, 2004, which was denied on September 1, 2004.

CONSTITUTIONAL PROVISIONS AND STATUTES

SPENDING CLAUSE: ARTICLE I, SECTION 8

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMERICANS WITH DISABILITIES ACT (ADA)

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act.

CIVIL RIGHTS REMEDIES EQUALIZATION ACT (CRREA)

42 U.S.C. § 2000d-7. Civil rights remedies equalization

(a)(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

REHABILITATION ACT

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

STATEMENT OF THE CASE

Plaintiff, Adam Barbour, is an electrician who was employed by the Washington Metropolitan Area Transit Authority (WMATA) for approximately five weeks, from February 23, 1998 until April 1, 1998. He was terminated during his probationary period. WMATA operates the mass transit system in the national capital region, including the

Metrorail subway system. Mr. Barbour was assigned to the power department of the Metrorail system. WMATA contends that it terminated plaintiff for having been insubordinate to his immediate supervisor, for threatening and intimidating female co-workers, and for almost knocking down another co-worker. Mr. Barbour contends that he was terminated because of his bipolar disorder, which he contends constitutes a mental disability.

Mr. Barbour challenged his termination as being a violation of the District of Columbia Human Rights Act, D.C. Code Ann. § 2-1401.01 *et seq.*; the Americans With Disabilities Act, 42 U.S.C. § 12112(a); the Rehabilitation Act, 29 U.S.C. § 794; and Title VII of the Civil Rights Act of 1964. He claimed that he was not afforded reasonable accommodation of his disability. He also alleged intentional infliction of emotional distress and negligent supervision and entrustment. He sued WMATA and four individuals, including Richard White, the General Manager of WMATA. Early on, the district court granted defendants' motion to dismiss, on immunity grounds, the claims arising under the D.C. Human Rights Act. Thereafter, defendants moved for summary judgment as to all remaining claims, which was granted, except as to the Rehabilitation Act claims. In a separate ruling on the issue of WMATA's Eleventh Amendment immunity from Rehabilitation Act claims, the district court denied WMATA's motion and found that WMATA had "constructively waived" its immunity by voluntarily participating in a federal spending program, where Congress expressed a clear intention to condition receipt of federal funds on waiver of the states' sovereign immunity from suit. App. 44a-47a.

WMATA appealed on an interlocutory basis, relying upon *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-47 (1993) and *KiSKA Const. Corporation-U.S.A. v. Washington Metro. Area Transit Auth.*, 167 F.3d 608, 610-11 (D.C. Cir. 1999). A divided panel of the D.C. Circuit found that WMATA had waived its Eleventh Amendment immunity[1] by voluntarily accepting federal funds, and that the waiver, contained in the Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000(d)-7, was constitutionally valid under the standards enunciated in *South Dakota v. Dole*, 483 U.S. 203 (1987). First, the court held that in the CRREA, Congress made clear that receipt of funds is conditioned on a waiver of Eleventh Amendment immunity for claims arising under the Rehabilitation Act. App. 7a. Second, the court rejected WMATA's argument that it had not knowingly consented to waiver of its immunity, finding that *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001), upon which WMATA relied, added a wrongful requirement, that waiver be knowing. App. 12a-13a. Finally, the court held that there was no Spending Clause violation, as the waiver requirement of § 2000d-7 was adequately related to the federal interest in transportation appropriations. App. 15a. The dissent took issue with the third conclusion. The dissent would have found insufficient the purported nexus between the condition (waiver of immunity) and the federal transportation appropriations. That Congress "did not want any federal funds to be used to facilitate disability discrimination," although a laudable

1. The court recognized that WMATA, which was created by an interstate compact among three jurisdictions, Maryland, Virginia and the District of Columbia, enjoys the Eleventh Amendment immunity of the two signatory states, relying upon *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49-50 & n.20 (1994) and *Morris v. WMATA*, 781 F.2d 218, 219-20 (D.C. Cir. 1986). App. 3a.

goal, is not necessary or proper to providing mass transit. The dissent chided the majority for allowing the legislature to impose conditions under the Spending Clause, "without any judicially enforceable outer limit." App. 24a.

REASONS FOR GRANTING THE PETITION

Review is warranted as to the first question because, by emphasizing Congressional powers under the Spending Clause at the expense of the states' Eleventh Amendment immunity, the decision below stands in contravention of a decade long trend by this Court in regard to both Tenth and Eleventh Amendment jurisprudence. The D.C. Circuit erred in its conclusion that Congress did not exceed its powers under the Spending Clause by requiring that states waive their immunity from suit for employment discrimination under the Rehabilitation Act as a condition of obtaining federal transportation funds. The lower court's analysis would allow Congress to circumvent the Eleventh Amendment at will, by tying policy goals to unrelated federal grants. The circuits are split on the second question, whether a waiver of immunity is ineffective if not made knowingly. Supreme Court review is necessary to clarify the conditions necessary for states to effectively waive their Eleventh Amendment immunity. The lower court decision should be reversed to make clear that a waiver of Eleventh Amendment immunity is ineffective if a state has not acted knowingly. In this case the waiver was ineffective because the confused state of the law precludes a finding that WMATA acted knowingly.

I. CONGRESS EXCEEDED ITS POWER UNDER THE SPENDING CLAUSE WHERE THERE IS AN INSUFFICIENT NEXUS BETWEEN FEDERAL TRANSPORTATION APPROPRIATIONS AND THE WAIVER OF IMMUNITY

The D.C. Circuit found that in enacting the Rehabilitation Act, pursuant to its Spending Clause powers, Congress was entitled to place conditions upon a state's receipt of federal funding. Under *South Dakota*, the claimed waiver in the CRREA is unenforceable because there is an insufficient relationship between the purpose of the expenditures under which WMATA receives federal funding and the conditions imposed by the Act. In *New York v. United States*, 505 U.S. 144, 167 (1992), this Court noted that the condition adopted by Congress must "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Under *South Dakota*, 483 U.S. at 207, Congress' power under the Spending Clause is not unlimited, but must meet at least four requirements, including separate requirements that the exercise of the spending power be in pursuit of "the general welfare," and that the restriction be related "to the federal interest" in the particular project or program. The D.C. Circuit's holding collapses these two distinct requirements into a single requirement. The interest which the lower court identified, "deterring federally supported agencies from engaging in disability discrimination" (App. 12a), would satisfy the general welfare requirement. However, the plaintiffs and the lower court failed to identify anything in the Transportation Department appropriations

bills or substantive law governing transportation grantees which evidences a purpose of the appropriations as being to deter employment disability discrimination by states, which is the point of the waiver requirement. In the absence of such a legislative purpose for the appropriations to supply the necessary nexus, Congress did not properly exercise its powers under the Spending Clause. Under *Tennessee v. Lane*, __ U.S. __, 124 S. Ct. 1978, 1992-93 (2004), this Court should analyze the Spending Clause issue in the context of employment discrimination, without regard to other issues of access by handicapped patrons to mass transit. It should find that there is no connection between funding capital projects and waiver of immunity in employment discrimination matters, and should therefore reverse the lower court.

Under *South Dakota*, the waiver is unenforceable because there is no nexus between the condition imposed by the CRREA, waiver of state Eleventh Amendment immunity, and the interest in the particular national project or program. Congress knows how to legislate to provide for the needs of persons with disabilities. With respect to Department of Transportation appropriations, it enacted specific requirements within 49 U.S.C. § 5307(d)(1)(D) and made findings regarding planning and designing accessible facilities, 49 U.S.C. § 5301(d), 5301(f)(4). The former requires Transportation Department grantees to provide reduced fares to the disabled. None of these statutory provisions relates to the condition imposed by Congress, waiver of immunity from employment discrimination suits. Elimination of employment discrimination against the disabled is nowhere identified as a purpose of federal transportation appropriations and is unrelated to the purposes of the federal appropriations in this area, which is to increase

and improve mass transit service. The D.C. Circuit erred because it assumed that the intent of the CRREA, assuring that federal funds are not used in any way which facilitates disability discrimination, was also a purpose of federal transit aid, without a scintilla of legislative support for this leap. Although the CRREA is a reasonable measure to promote the general welfare, *South Dakota* requires that there be a connection between the CRREA and the federal interest in mass transportation funding, as evidenced, for example, in the language of the annual appropriations bills. That requirement was not satisfied here.

The requirement of the CRREA, that WMATA waive its immunity, is not reasonably related to the purpose of federal transportation appropriations. The purpose of block grants made by the Secretary of Transportation is to further capital projects and to finance the planning and improvement of transit equipment and facilities. There is no relationship between this goal and authorizing private suits to challenge employment discrimination. To the extent that waiver of Eleventh Amendment immunity makes a grantee more susceptible to lawsuits and sizeable judgments,[2] waiver is

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2. Consideration should be given to the unlimited monetary remedy which will be afforded to litigants alleging employment discrimination by grantees. The remedies available for Rehabilitation Act violations are those provided under Title VI of the Civil Rights Act of 1964, which includes an unlimited amount of damages. *See Barnes v. Gorman*, 536 U.S. 181, 189 & n.3 (2002). In contrast, damages available under the Americans With Disabilities Act against private litigants are capped at $300,000, because the remedial scheme incorporates the damages remedy available under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117 and 42 U.S.C. § 1981A. There has not been any showing that injunctive relief against states, available in accordance with *Ex Parte Young*, 209 U.S. 123 (1908), is insufficient to vindicate the federal interest.

antithetical to the purpose of the appropriation, as the waiver could cause the public fisc to be depleted and make less local money available to create and maintain the transportation infrastructure.

This Court has previously struck down an act of Congress as exceeding Congress' spending power in *United States v. Butler*, 297 U.S. 1, 78 (1936). It held that it would be implausible that, in establishing the Constitution, the drafters would "limit and define its [the federal government's] powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States," while, in a single clause, giving "power to the Congress to tear down the barriers, to invade the states' jurisdictions . . . subject to no restrictions save such as are self-imposed." The continuing vitality of *Butler* was recognized by both the majority and in the dissent in *South Dakota*. 483 U.S. at 207, 209, and 216-17.

An attenuated connection between the federal interest and sweeping effect of federal legislation in part explains this Court's recent invalidation of two federal statutes as exceeding Congress' Commerce Clause powers. In the first, *United States v. Lopez*, 514 U.S. 549, 563-64 (1995), the Court struck down a federal statute seeking to penalize the possession of a firearm in a school zone. The Court rejected the government's argument that violent crime could affect the functioning of the national economy. Chief Justice Rehnquist, writing for the majority, stated that the government's reasoning, if accepted, would lead the Court to conclude that there is "no activity by an individual that Congress is without power to regulate." In *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that the

Commerce Clause did not provide Congress with authority to enact the civil remedy provision of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981. The Court discussed the holding in *Lopez*, noting that it rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Morrison*, 529 U.S. at 612. Although the VAWA contained Congressional findings, the Court discounted their value because of the tenuous connection between violence against women and national productivity and health costs. "The concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded." *Id.* at 615. These two cases, although involving the Tenth Amendment to the Constitution, reflect concern by this Court that Congress not be permitted to run roughshod over the powers of other units of government. They reinforce the concept that there must be an actual connection between the condition, here waiver of immunity, and the purposes of appropriations.

The absence of a connection between the purposes of federal appropriations and the waiver requirement of the CRREA led four judges of the Eighth Circuit to dissent in *Jim C. v. United States*, 235 F.3d 1079, 1082, 1084 (8th Cir. 2000) (en banc). They opined that the requirements of *South Dakota* were not met because the required waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims bore no direct relationship ("indeed, not even a discernible relationship") to the purpose of federal grants to the states for education. They noted that the purpose of the grants, broadly stated, is to improve the overall quality of education and that the condition imposed in this case, waiver of immunity, is overbroad, going as it does to all federal funds

received by the Arkansas Department of Education, no matter what the particular purpose of the funds. They found that although it presumably would be permissible for Congress to condition the receipt of any grants it might make specifically for Rehabilitation Act purposes upon a waiver of state immunity from § 504 claims—a normal quid pro quo—it would not be permissible to condition the receipt of other, unrelated federal grants for education upon such a waiver. There is no suggestion that WMATA receives Rehabilitation Act funds.[3] Thus, the dissent below correctly found that "there is no reasonably close relationship between the grant of funds here and the imposed condition. . . . As applied in this case, the condition is subjecting WMATA to private suit for money damages for discrimination against its employees on the basis of disability. . . . [This] is simply not 'Necessary and Proper.'" App. 9a.

II. IS THE CRREA INEFFECTIVE BECAUSE, EVEN IF CONGRESS EXPLICITLY CONDITIONED GRANTS ON LOSS OF IMMUNITY, WMATA DID NOT KNOWINGLY WAIVE ITS IMMUNITY

There is a conflict in the circuits as to whether a waiver of state Eleventh Amendment immunity is automatically effective if Congress has clearly made its intentions known. *Compare, Barbour*, App. 9a[4] *with Garcia v. S.U.N.Y. Health*

3. The Rehabilitation Act is both a source of positive law barring discrimination against discrimination and an authorizing statute for vocational rehabilitation assistance. A nexus could be readily found if WMATA received Rehabilitation Act funds, which it does not.

4. *Barbour* relied upon *Doe v. Nebraska*, 345 F.3d 593, 601-02 (8th Cir. 2003); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003); and *M.A. ex rel. E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 351 (3d Cir. 2003).

Sciences Ctr., 280 F.3d 98 (2d Cir. 2001)[5]. In *Garcia*, the Second Circuit said that the state had not knowingly waived its Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act because the state had reason to believe that Congress had already abrogated its immunity to claims under the ADA. 280 F.3d at 114. Although the Second Circuit recognized that Congress had clearly manifested its intent to condition acceptance of federal funds on the state's waiver of its Eleventh Amendment immunity, the court held that this did not compel a finding that New York had waived its immunity in accepting federal funds. *Id.*, at 113-114. The court below held that the sole criterion for determining whether a waiver is valid is whether Congress explicitly made known its intentions. *Barbour*, App 9a. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003), upon which the D. C. Circuit relied, expressed its basis for rejecting *Garcia* as follows: "[w]here Congress has unambiguously conditioned the receipt of federal funds on a waiver of immunity, . . . [there is no] possibility that a state can continue to accept federal funds without knowingly waiving its immunity."

Since *Garcia* issued, this Court has indicated that an analysis of whether the state's action was knowing is required. Under *Barnes v. Gorman*, 536 U.S. 181, 186 (2002),

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5. The Fifth Circuit had adopted this analysis but granted rehearing en banc to review the matter. *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir.), *reh'g granted*, 339 F.3d 348 (5th Cir. 2003) and *Miller v. Texas Tech. Univ. Health Sciences Ctr.*, 330 F.3d 691, 694 (5th Cir.), *reh'g granted*, 342 F.3d 563 (5th Cir. 2003). *See also Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, Kozinski, Kleinfeld and Gould, dissenting from denial of rehearing en banc) and *Doe v. Nebraska*, 345 F.3d 593, 604-06 (8th Cir. 2003) (Bowman, dissenting).

for a waiver of immunity to be effective, a state must knowingly and voluntarily waive its immunity. *Barnes* emphasizes that when Congress invokes its Spending Clause powers, it is analogous to the formation of a contract.

> Just as a valid contract requires offer and acceptance of its terms, 'the legitimacy of Congress' power to legislate under the spending power . . . rests on whether the recipient voluntarily and knowingly accepts the terms of the contract. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Barnes, 536 U.S. at 186. Until *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) was decided, WMATA reasonably believed that the CRREA had abrogated its immunity and it did not believe it had entered into a contract which included a mandatory waiver provision.

In assessing whether there has been a knowing and intentional waiver of Eleventh Amendment immunity, "every reasonable presumption against waiver is to be indulged." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd.*, 527 U.S. 666, 682 (1999). The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *College Savings Bank*, 527 U.S. at 675. Waiver will only be found where it is expressly stated in the text of the statute or because the overwhelming implications from the text will leave no room for any other reasonable construction. Id. at 678. *Raygor v. Regents of U. of Minn.*, 534 U.S. 533, 543-45 (2002) declined to apply a provision of the federal supplemental jurisdiction statute (28 U.S.C. § 1367(d))

to the states, finding in part that it was far from clear whether Congress intended tolling to apply when claims against nonconsenting states were dismissed pursuant to the Eleventh Amendment. "When Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'. . . . " The approach taken by the D.C. Circuit, which proscribes analysis of whether the state's action was knowing, leads to the danger identified by this Court in *College Savings*, that Congress might use its Article I powers to subvert the anti-abrogation holding of *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). *College Savings Bank*, 527 U.S. at 683.

To find waiver, the "state must make a 'clear declaration' that it intends to submit itself" to federal court jurisdiction. 527 U.S. at 676. Three times the Court in *College Savings* noted its antipathy toward the concept of compelled waiver which underlies the lower court's interpretation of the CRREA. The Court noted skeptically that the statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity was the very provision that purported to abrogate it. 527 U.S. at 684. It described forced waiver as abrogation under but a different name, describing them as not even being different sides of the same coin. 527 U.S. at 683. In rejecting the concept of constructive waiver, the Court noted

> [t]he whole point of requiring a 'clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. . . . There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress' expressing unequivocally

> its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. This is very far from concluding that *the State* made an altogether voluntary decision to waive its immunity.

527 U.S. at 680.[6] (emphasis in original).

Before this Court's 2001 holding in *Garrett*, WMATA would have reasonably understood that its sovereign immunity had already been abrogated by Congress because it would have believed, as several courts did, that the CRREA was an abrogation statute. *Garrett* held that in enacting the ADA, Congress lacked the necessary findings of comprehensive wrongful conduct by the states to warrant abrogation and because there was insufficient congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Before *Garrett*, WMATA could not have understood that by accepting federal funds, it was relinquishing its Eleventh Amendment immunity, because WMATA would have assumed that this had been taken away (i.e. abrogated) by Congress. *See Garcia*, 280 F.3d at 114.

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6. Two district courts have recognized that there is little distinction between constructive waivers and abrogation in suits brought to enforce the Fair Labor Standards Act. *DiGiore v. Illinois*, 962 F. Supp. 1064, 1075 (N.D. Ill. 1997) (difference between constructive waiver and abrogation is purely semantic), *aff'd sub nom., DiGiore v. Ryan*, 172 F.3d 454 (7th Cir. 1999) and *Goebel v. Colorado*, 1996 U.S. Dist. Lexis 20929 (D. Colo. 1996). In each, the claims against the states were dismissed for lack of jurisdiction.

When Barbour was terminated in 1998, before *Kimel* or *Garrett* was decided, WMATA had no reason to believe that it had any immunity to waive in this regard. The CRREA was enacted in response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that the Eleventh Amendment barred the claims against California. The CRREA was an effort to rectify Congress' failure to unequivocally express an intent to abrogate the state's Eleventh Amendment immunity.[7] *Lane v. Pena*, 518 U.S. 187, 198 -99 (1996). When this Court first discussed the CRREA, in *dicta* in *Dellmuth v. Muth*, 491 U.S. 223, 229-30 (1989), it interpreted the CRREA as an abrogation statute. At issue was whether the language of the Education for the Handicapped Act (EHA) was sufficient to abrogate state immunity from suit. It held:

> [w]ithout intending in any way to prejudge the Rehabilitation Act amendments, we note that a comparison of the language in the amendments with the language of the EHA serves only to underscore the difference in the two statutes, and the absence of any clear statement of abrogation

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7. Section 1003 [the CRREA] was enacted in response to our decision in *Atascadero* . . . where we held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act, and that the States accordingly were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504.

Lane, 518 U.S. at 198.

> in the EHA. The amendments to the Rehabilitation Act read in pertinent part: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of [several enumerated provisions] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U. S. C. § 2000d-7(a) (1) (1982 ed., Supp. IV). When measured against such explicit consideration of abrogation of the Eleventh Amendment, the EHA's treatment of the question appears ambiguous at best.

Throughout the 1990's, district courts treated the CRREA as an abrogation statute.[8] As late as December of 2001, close to three years after Mr. Barbour was fired and after *Garrett* was decided, the Fifth Circuit held that the CRREA was an "*unequivocal* statement of intent to abrogate" state immunity from suits under the Rehabilitation Act.[9] (emphasis added). This was consistent with prior decisions of the Second and

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8. *Middlebrooks v. University of Maryland at College Park*, 980 F. Supp. 824, 827-28 (D. Md. 1997), *aff'd*, 166 F.3d 1209 (4th Cir. 1999); *Grimes v. Sobol*, 832 F. Supp. 704, 707 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir.1994); *United States ex rel. Moore v. University of Michigan*, 860 F. Supp. 400, 404 (E.D. Mich.1994) (relying upon *Dellmuth*); and *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 834 F. Supp. 1216, 1223 (D. Alaska 1991) (relying upon *Dellmuth*).

9. *Reickenbacker v. Foster*, 274 F.3d 974, 977 and n.11 (5th Cir. 2001). There the Fifth Circuit declined to consider the issue of waiver of immunity by the states. It held, as to both the ADA and Rehabilitation Act claims of a prisoner, that Congress lacked the power to abrogate the states' Eleventh Amendment immunity.

Eleventh circuits.[10] The fact that Congress used the same language in the Rehabilitation Act as it used in other contexts, including the ADA, 42 U.S.C. § 12202, to attempt to abrogate state Eleventh Amendment immunity, would have strengthened the perception that the CRREA was an abrogation statute not a waiver statute.

The court below erroneously found that by the time WMATA terminated Mr. Barbour in 1998, it should have known that the argument regarding abrogation was not tenable and therefore at the time, its action in accepting the grant moneys constituted a voluntary waiver of immunity. App. 10a. The majority found that WMATA would have understood that the Court's decision in *Seminole Indian Tribe* had rendered invalid attempted abrogation, relying upon WMATA's assertion of immunity from the Age Discrimination in Employment Act (ADEA) in *Jones v. WMATA*, No. 89-552 (D.D.C.) App. 10a. This finding is deficient because this Court's jurisprudence on the Eleventh Amendment reflects the need for statute by statute assessment of Congressional power to abrogate. On April 30, 1998 (less than a month after Mr. Barbour was terminated), in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), the Eleventh Circuit held that states were entitled to Eleventh Amendment immunity from suits by private citizens under the Age Discrimination in Employment Act (ADEA), but not under the ADA, because Congress had only effectively abrogated states' Eleventh Amendment immunity from suits under the ADA. This Court affirmed on the ADEA claim in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) but later reversed the Circuit on the ADA holding in

10. *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 79-80, 82 (2d Cir. 2000); and *Sandoval v. Hagan*, 197 F.3d 484, 493, n.5 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001).

Garrett, 531 U.S. 356 (2001). The three members of the Eleventh Circuit who participated in *Kimel* wrote three different opinions. WMATA's decision to assert immunity from ADEA claims did not compel it to assert immunity from Rehabilitation Act claims, and WMATA's litigation posture in *Jones*, an ADEA case, has no bearing on the question of whether WMATA acted knowingly in accepting federal grants. When WMATA initially filed a Motion To Dismiss in the instant case in 2000, prior to *Garrett*, WMATA did not assert immunity from the Rehabilitation Act claim, indicating its reasonable belief, consistent with the Eleventh Circuit, that Congress had abrogated immunity under the ADA and Rehabilitation Act.

The D.C. Circuit wrongfully concluded that *Garcia*, 280 F.3d at 114-115 and n.5, adopted an improper criterion regarding the government's state of mind in accepting the allegedly conditioned federal funds. App. 10a. The test which was applied in *Garcia*, and which WMATA urges this Court to apply, is not based on consideration of the subjective state of mind of the state officials. Rather, it is based on an analysis of decisional law, not unlike the analysis used in determining whether a state official is entitled to qualified immunity, based upon a reasonable understanding of federal law at the time of the alleged improper act. *Garcia* added no new requirements to the test — it merely held that in regard to the Rehabilitation Act, the waiver could not be have been a knowing one because of the uncertainty in the law.

WMATA's argument that it did not make a knowing decision to waive its immunity is consistent with the second prong of *South Dakota*, which requires that Congress must act "unambiguously." *South Dakota*, 483 U.S. at 207.

The state of the law allowed the language of the CRREA to be read in several ways, either as the language of abrogation or as the language of waiver. This precluded a finding that the states had made a knowing choice, "cognizant of the consequences of their participation." *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted

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APPENDIX

APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 9, 2004

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

No. 03-7044

ADAM BARBOUR,

Appellee,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Appellant,

UNITED STATES OF AMERICA,

Intervenor.

Argued: February 10, 2004

Decided: July 9, 2004

Before: SENTELLE, GARLAND, and ROBERTS, Circuit Judges.

OPINION

GARLAND, Circuit Judge:

The Washington Metropolitan Area Transit Authority (WMATA) contends that sovereign immunity protects it from being sued in federal court under § 504 of the Rehabilitation

Act, 29 U.S.C. § 794, for discriminating on the basis of disability. It insists that it did not waive that immunity by accepting federal financial assistance, and further maintains that Congress lacks power under the Spending Clause to condition the receipt of federal funds on such a waiver. We disagree and hold that WMATA has waived its immunity to Rehabilitation Act suits by taking federal transportation funds.

I

WMATA fired Adam Barbour from his position as a probationary electrician on April 1, 1998. Barbour charges that WMATA fired him because he suffers from a mental disability, bipolar disorder. WMATA denies the charge, maintaining that it terminated Barbour for insubordinate, threatening, and anti-social behavior.

On February 24, 2000, Barbour sued WMATA in the United States District Court for the District of Columbia under federal and local causes of action, alleging that the Authority discriminated against him because of his disability. Only one cause of action survived WMATA's motions for dismissal and summary judgment: Barbour's claim that his discharge violated § 504 of the Rehabilitation Act. In permitting that claim to go forward, the district court rejected WMATA's contention that the Eleventh Amendment renders WMATA immune from a Rehabilitation Act suit for money damages in federal court.

WMATA now appeals the district court's denial of immunity, a kind of interlocutory appeal over which this court

has jurisdiction. *See KiSKA Constr. Corp.-U.S.A. v. WMATA*, 167 F.3d 608, 610-11 (D.C. Cir. 1999). The United States has intervened on Barbour's side, maintaining that WMATA waived its Eleventh Amendment immunity by accepting federal funds, and that the waiver is constitutionally valid. These issues regarding WMATA's immunity are the only ones that we decide on this appeal. Because the claim of immunity presents a legal question, our review is de novo. *See United States v. Microsoft*, 253 F.3d 34, 50-51 (D.C. Cir. 2001).

II

WMATA, a mass transit system for the District of Columbia and surrounding suburban areas, was created by an interstate compact among Maryland, Virginia, and the District of Columbia, and enjoys the Eleventh Amendment immunity of the two signatory states. *Morris v. WMATA*, 781 F.2d 218, 219-20 (D.C. Cir. 1986); *see Hess v. Port Auth. Trans.-Hudson Corp.*, 513 U.S. 30, 49-50 & n.20, 115 S. Ct. 394, 405 & n.20, 130 L. Ed. 2d 245 (1994). The Eleventh Amendment to the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "Although by its terms the Amendment applies only to suits against a State by citizens of another State," the Supreme Court has "extended the Amendment's applicability to suits by citizens against their own states." *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 362, 121 S. Ct. 955, 961, 148 L. Ed. 2d 866 (2001).

Appendix A

There are two important exceptions to Eleventh Amendment immunity. First, a state may *waive* its immunity and consent to suit. Second, Congress may exercise its enforcement power under § 5 of the Fourteenth Amendment to *abrogate* a state's immunity without its consent. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S. Ct. 2219, 2223, 144 L. Ed. 2d 605 (1999) (citing *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883), and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S. Ct. 3142, 3145, 87 L. Ed. 2d 171 (1985). Whether WMATA waived its immunity is the question at issue here.

The " 'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.' " *College Savings*, 527 U.S. at 676, 119 S. Ct. at 2226 (quoting *Atascadero*, 473 U.S. at 241, 105 S. Ct. at 3146-47). The courts will find a waiver if a state makes a "clear declaration" of its intent to submit to federal court jurisdiction. *Id.* To elicit a clear declaration, Congress "may, in the exercise of its spending power, condition its grants of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions." *Id.* at 686, 119 S. Ct. at 2231. But Congress must exercise its power explicitly: a congressional waiver provision is constitutional only if it manifests "a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247, 105 S. Ct. at 3149-50.

Appendix A

WMATA denies that it consented to waive its Eleventh Amendment immunity from suit under the Rehabilitation Act. First, it contends that Congress did not clearly condition acceptance of federal transportation funds on such a waiver. Second, WMATA maintains that, even if Congress did condition financial assistance on a waiver, WMATA did not knowingly accept the money on that basis. We consider these arguments in turn.

A

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a). The Act provides remedies for violations of § 504 by "any recipient of Federal assistance." *Id.* § 794a(2). In *Atascadero State Hospital v. Scanlon*, the Supreme Court found that the Rehabilitation Act's "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," 473 U.S. at 246, 105 S. Ct. at 3149, and "likewise falls short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," *id.* at 247, 105 S. Ct. at 3149-50. Accordingly, the Court concluded that the Eleventh Amendment remained effective

in proscribing Rehabilitation Act suits against states and state agencies. *Id.*

In 1986, in response to *Atascadero*, Congress passed the Civil Rights Remedies Equalization Act (CRREA), which provides in relevant part:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1); *see Lane v. Pena*, 518 U.S. 187, 198, 116 S. Ct. 2092, 2099-100, 135 L. Ed. 2d 486 (1996). Every circuit that has considered the question — that is, every circuit other than our own and the Federal Circuit — has held that the language of the CRREA unambiguously conditions a state agency's acceptance of federal funds on its waiver of Eleventh Amendment immunity.[1] Albeit in

1. *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234 (3d Cir. 2003); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999); *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir. 2003), *vacated & reh'g en banc granted*, 339 F.3d 348 (5th Cir. 2003); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001); *Stanley v. Litscher*,

(Cont'd)

dictum, the Supreme Court has said so as well. *See Lane*, 518 U.S. at 200, 116 S. Ct. at 2100 (declaring that in the CRREA, "Congress responded to our decision in *Atascadero* by crafting *an unambiguous waiver* of the States' Eleventh Amendment immunity") (emphasis added).

Notwithstanding the views of the circuits and of the Supreme Court, WMATA maintains that the CRREA does not make clear that receipt of funds is conditioned on a waiver of immunity. We disagree. The CRREA identifies "recipients of Federal financial assistance" as the *only* entities whose immunity is vulnerable. Moreover, the CRREA waiver is directly tied to Rehabilitation Act § 504, which likewise applies only to discrimination "under any program or activity receiving Federal financial assistance," including state instrumentalities. 29 U.S.C. § 794(a); *see id.* § 794(b). The language of the two statutes together is thus undeniably clear about the simple choice offered to states: if they accept federal funds, they will lose their immunity to Rehabilitation Act suits for discriminatory acts; if they decline the money, they remain free of the Act's proscriptions. WMATA could have avoided the Act — and preserved its immunity — by declining to take federal transportation funds. It chose not to. By stepping into the statute's reach, it voluntarily exposed itself to the suits the statute authorizes.

(Cont'd)

213 F.3d 340 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002); *Garrett v. University of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288 (11th Cir. 2003).

WMATA insists that the CRREA is ambiguous because its opening clause — "A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court" — parallels language that Congress has frequently used in attempting to abrogate state immunity. The Supreme Court has indeed construed similar statutory language as the language of abrogation. *See, e.g., Garrett*, 531 U.S. at 360, 121 S. Ct. at 960 (Americans with Disabilities Act, 42 U.S.C. § § 12111-12117, 12202); *College Savings*, 527 U.S. at 682, 119 S. Ct. at 2229 (Lanham Act, 15 U.S.C. § 1122(a)); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635, 119 S. Ct. 2199, 2204-05, 144 L. Ed. 2d 575 (1999) (Patent Remedy Clarification Act, 35 U.S.C. § 296(a)).[2] WMATA argues that, while "abrogation and waiver are related concepts," it is "implausible that the same words would mean both." Appellant's Br. at 5.

Whatever the validity of WMATA's claim that the language of the CRREA's opening clause cannot do double duty, that claim simply ignores the statute's closing words, which, like those of the Rehabilitation Act, single out recipients of "Federal financial assistance" as the only entities within the statute's purview. By contrast, none of the abrogation statutes WMATA cites contains anything more than the naked "shall not be immune" language. This is a distinction of considerable difference.

College Savings Bank v. Florida Prepaid makes clear why this distinction matters. In that case, the question was

2. In the cited cases, the Court ruled that abrogation was beyond Congress' authority.

whether Congress could condition a state's sale of a tuition prepayment plan on relinquishment of its immunity to Lanham Act suits for false advertising. The Court held that such a condition amounted to a "forced," rather than a voluntary waiver because the state could not avoid liability except by abstaining from interstate commerce. 527 U.S. at 683, 119 S. Ct. at 2229-30. At the same time, however, *College Savings* declared that "conditions attached to a State's receipt of federal funds are simply not analogous to . . . conditions attached to a State's decision to engage in otherwise lawful commercial activity." *Id.* at 678 n.2, 119 S. Ct. at 2227 n. 2 As the Court explained, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.* at 686-87, 119 S. Ct. at 2231. Thus, what Congress threatens if the state refuses to agree to its spending condition is merely "the denial of a gift or gratuity," which is "fundamentally different" from the "automatic [ ]" coercion that takes place when "what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *Id.*[3] With this distinction, the Supreme Court reaffirmed its prior holdings "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the

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3. Although *College Savings* noted that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,' " 527 U.S. at 687, 119 S. Ct. at 2231 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S. Ct. 2793, 2798, 97 L. Ed. 2d 171 (1987)), WMATA does not suggest that point has been passed here.

actions." *Id.* at 686, 119 S. Ct. at 2231 (citing *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987)). Because that is precisely what Congress did in the CRREA, we reject WMATA's contention that its acceptance of funds was insufficient to constitute a valid waiver of its Eleventh Amendment immunity.

B

WMATA's second argument is that, even if the CRREA did unambiguously condition receipt of funds on a waiver of immunity, the Authority nonetheless did not *knowingly* consent to such a waiver by taking federal funds in 1998, the year in which it terminated Barbour. In that year, WMATA contends, "it reasonably believed that Congress had already abrogated its immunity" from suits for disability discrimination by virtue of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(a). Reply Br. at 7.[4] Although the Supreme Court later held in *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), that Title I exceeded Congress' authority to abrogate sovereign immunity, WMATA argues that it could not have predicted that result in 1998. At that time, WMATA maintains, it mistakenly believed that waiving immunity to Rehabilitation Act suits by accepting federal funds would cost it little that the ADA had not already taken. This misapprehension regarding the scope of its existing immunity, WMATA concludes, renders its waiver "unknowing" and hence invalid.

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4. Title I bars a covered entity from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

A similar argument prevailed in *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), a case involving alleged disability discrimination by a New York instrumentality in 1995. No other circuit has accepted this argument,[5] and those that have considered the issue have decided to the contrary. *See Doe v. Nebraska*, 345 F.3d 593, 601-02 (8th Cir. 2003); *Garrett v. University of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292-93 (11th Cir. 2003); *M.A. v. State-Operated Sch. Dist.*, 344 F.3d 335, 349-51 (3d Cir. 2003). We likewise reject it, and with it WMATA's claim that it did not knowingly waive its immunity when it took federal transportation funds in 1998. We do so for three reasons.

First, *College Savings* and *Atascadero* establish a single criterion for determining the validity of a waiver: Congress must clearly condition acceptance of federal funds on the state's waiver of its sovereign immunity. *See College Savings*, 527 U.S. at 686, 119 S. Ct. at 2231; *Atascadero*, 473 U.S. at 247, 105 S. Ct. at 3150. Although it is true that an effective waiver must be "knowing," accepting federal funds on a clear condition constitutes an objective manifestation of knowledge. As the Court said in *College Savings*, when the condition is explicit, "acceptance of the funds entails an agreement to the actions." 527 U.S. at 686, 119 S. Ct. at 2231. *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1539-40, 67 L. Ed. 2d 694 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

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5. A panel of the Fifth Circuit agreed with *Garcia*, but the full court vacated that decision pending reconsideration en banc. *See Pace*, 339 F.3d 348 (granting petition for rehearing en banc).

Although *Garcia* conceded that the CRREA "constitutes a clear expression of Congress' intent to condition acceptance of funds on a state's waiver of its Eleventh Amendment immunity," 280 F.3d at 113, it added a second criterion for validity: that "the state, in accepting the funds, *believed* it was actually relinquishing its right to sovereign immunity." *Id.* at 115 n.5 (emphasis added). But the Supreme Court has never considered a state's state of mind when ascertaining whether a waiver has been effected. Rather, it has directed courts to inquire only as to whether the state accepted federal funds in the face of a clear condition. Because that is just what WMATA did, its protestation of lack of knowledge is to no avail.

Second, even *Garcia* recognized that an argument like WMATA's, that a state instrumentality had miscalculated what its immunity was worth, would lose force as the Supreme Court's Eleventh Amendment jurisprudence evolved. Although *Garcia* saw no reason for New York to suspect that the ADA's abrogation was invalid in 1995, it acknowledged that a state's acceptance of funds at a later date — after the Supreme Court issued two decisions that formed the predicate for *Garrett* — "might properly reveal a knowing relinquishment of sovereign immunity." 280 F.3d at 113 n.4. When WMATA accepted federal funds in 1998, both of those predicate decisions had already been issued. *See City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997) (holding that legislation promulgated under § 5 of the Fourteenth Amendment that reaches beyond the scope of the Amendment's guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to

that end"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72, 116 S. Ct. 1114, 1131-32, 134 L. Ed. 2d 252 (1996) (holding that Congress lacks authority to abrogate state immunity under Article I of the Constitution). Indeed, WMATA itself argued in another case in 1997 — a year before Barbour was terminated — that the Court's decision in *Seminole Tribe* had rendered invalid Congress' attempted abrogation of state immunity in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* *See* Motion to Dismiss ADEA Claims, *Jones v. WMATA*, No. 89-552 (D.D.C. Jan. 14, 1997). Hence, even if we were to adopt *Garcia*'s analysis, it would be insufficient to sustain WMATA's claim of immunity in this case.

Finally, even if WMATA's state of mind were a relevant consideration, the underlying implication of its argument — that it was only WMATA's miscalculation about whether its immunity had already been abrogated by the ADA that led it to accept federal funds in 1998 — would fail on the facts. The CRREA, after all, was passed in 1986 — four years before the ADA, and hence four years before WMATA could claim that it thought it lost its protection against disability discrimination lawsuits. Nonetheless, WMATA took federal transportation funds during each of those years. Reply Br. at 9. Likewise, although *Garrett* was decided in 2001, WMATA has continued to take federal funds ever since — notwithstanding its knowledge that the ADA's abrogation was ineffective after that date. Indeed, at oral argument, counsel for WMATA conceded that "it is hard to imagine that the Authority would have foregone" the funds in 1998, whatever the impact on its sovereign immunity. Oral Arg. Tr. at 12. It is thus clear that WMATA's decision was not based on a

miscalculation about the scope of its sovereign immunity, but rather on a reckoning of the value of the financial assistance offered by the federal government.[6]

III

As a last argument, WMATA contends that Congress lacks power under the Spending Clause, U.S. Const. Art. I, § 8, cl.1, to condition WMATA's federal transportation funds on a waiver of immunity from suit under the Rehabilitation Act. Specifically, WMATA argues that the CRREA's waiver condition runs afoul of the Supreme Court's decision in *South Dakota v. Dole*, because it is "unrelated to the federal interest" in transportation funds. 483 U.S. 203, 206-07, 107 S. Ct. 2793, 2795-96, 97 L. Ed. 2d 171 (1987).[7] The Court did not elaborate on the meaning of that statement, and it has not

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6. In addition to contending that it believed the ADA had left it with nothing to lose by taking federal funds, WMATA argues that it thought the "abrogation language" of the CRREA similarly left it with liability under the Rehabilitation Act whatever it did. This argument is meritless, and no court has accepted it. As we have noted above, both the CRREA and the Rehabilitation Act apply only to discrimination by recipients of "Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1); 29 U.S.C. § 794(a). Hence, whether WMATA read the CRREA's text as the language of "abrogation" or of "waiver," it had to know that it could wholly avoid liability under the Rehabilitation Act by declining federal funds.

7. *Dole* listed a number of other limits on Congress' Spending Clause authority. WMATA does not contend that any of those apply here, except insofar as *Dole*'s requirement that funding conditions be "unambiguous," 483 U.S. at 207, 107 S. Ct. at 2796, is relevant to WMATA's arguments about waiver, a point we addressed in Part II.A.

done so since, other than to cite *Dole* for the proposition that conditions on the receipt of federal funds must "bear some relationship" to the purpose of the spending. *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 2423-24, 120 L. Ed. 2d 120 (1992). Nor has the Court ever overturned Spending Clause legislation on relatedness grounds. Whatever substantive limitation *Dole*'s relatedness requirement poses for congressional power, it is clear that the CRREA has not crossed that line.

In the CRREA, the legislature made clear that it did not want *any* federal funds to be used to facilitate disability discrimination, and that exposing recipient entities to the threat of federal damage actions was an effective deterrent. Congress's spending condition guarantees that federal money is used for the provision of transportation, and nothing else. Every circuit that has considered the issue has concluded that the connection between the congressional goal (that federal transportation funds be used exclusively for that purpose), and the congressional means (the spending condition), is close enough to be sustained under the spending power. *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) ("As to the third [*Dole*] requirement, § 2000d-7 is manifestly related to Congress's interest in deterring federally supported agencies from engaging in disability discrimination."); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 243 (3d Cir. 2003) (same); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (same).

We do not break any new ground in reaching the same conclusion. As the United States points out, the Rehabilitation Act's nondiscrimination requirement is patterned after Title

VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibit, respectively, race and sex discrimination in programs or activities that receive federal funds. *See NCAA v. Smith*, 525 U.S. 459, 466 n.3, 119 S. Ct. 924, 928 n.3, 142 L. Ed. 2d 929 (1999). In *Lau v. Nichols*, the Supreme Court upheld Title VI as valid Spending Clause legislation: "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. 563, 569, 94 S. Ct. 786, 789-90, 39 L. Ed. 2d 1 (1974). Similarly, with respect to Title IX, the Court held in *Grove City College v. Bell* that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. 555, 575, 104 S. Ct. 1211, 1222, 79 L. Ed. 2d 516 (1984) (citing *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1539-40, where the Court noted that, "pursuant to the spending power, . . . Congress may fix the terms on which it shall disburse federal money" if it does so "unambiguously").

WMATA's only response is to note, correctly, that *Lau* and *Grove City* predate *Dole*. But *Dole* itself cited *Lau* as a case in which Congress had lawfully used the spending power " 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " *Dole*, 483 U.S. at 206, 107 S. Ct. at 2795-96 (citing *Lau*, and quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 2772-73, 65 L. Ed. 2d 902 (1980) (opinion of Burger, C.J.)). The Supreme Court has never suggested that it has any second thoughts about its treatment of the spending power in either

Lau or *Grove City*.[8] To the contrary, in *New York v. United States*, the Court again held up *Lau* as an example of a Spending Clause case in which it had "found no constitutional flaw in a federal statute." 505 U.S. at 167, 112 S. Ct. at 2423-24. Nor did the specific condition imposed by regulation in *Lau* — that school systems provide language instruction for non-English-speaking students — bear a more "obvious relation," Dissenting Op. at 6, to the general federal (educational) appropriation to which it was tied than does the condition here. Nothing in *Lau* suggested that the federal funds were, or had to be, intended for classroom instruction rather than, for example, the acquisition of equipment or the construction of athletic facilities. *See* 42 U.S.C. § 2000d (barring discrimination in "any program or activity receiving Federal financial assistance").

In its most recent *Spending Clause* case, the Court confirmed the constitutionality of 18 U.S.C. § 666(a)(2), which makes bribery of officials of state entities that receive in excess of $10,000 in federal funds a federal crime, and which does not require a connection between a given bribe and a particular federal grant. *See Sabri v. United States*, __ U.S. __, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004).[9] "Congress has the authority

8. The Court did subsequently reject *Lau*'s interpretation of Title VI as extending beyond intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 285, 121 S. Ct. 1511, 1518-19, 149 L. Ed. 2d 517 (2001). And the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687, superceded *Grove City*'s interpretation of the scope of Title IX. *See NCAA*, 525 U.S. at 465-66 & n.4, 119 S. Ct. at 927-28 & n.4; *see also* 29 U.S.C. § 794(b).

9. The dissent's contention that *Sabri* is distinguishable because "[r]ampant bribery of WMATA officials . . . would make it more difficult

(Cont'd)

under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I § 8, cl.1," the Court said, "and it has corresponding authority under the Necessary and Proper Clause, Art. I § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft." *Id.* at 1946. That statement echoes the congressional purpose underlying Title VI, as the Court understood it in *Lau*: " 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' " 414 U.S. at 569, 94 S. Ct. at 789 (quoting 110 Cong. Rec. 6543 (March 30, 1964) (Sen. Humphrey, quoting President Kennedy's message to Congress, June 19, 1963)). We see no reason why it should matter, for purposes of the Spending Clause, that in the case before us Congress' concern runs to discrimination on the basis of disability rather than race. Indeed, Congress reasonably can insist that decisions regarding the expenditure of federal funds not be based on irrational discrimination. Such discrimination "fritter[s] away" federal funds, 124 S. Ct. at 1946, just like the graft discussed in *Sabri*, and insisting on a waiver of immunity to help combat it is just as closely related to the underlying purpose of providing such funds.

Finally, we note an analytic difference that may be at the root of our disagreement with our dissenting colleague.

(Cont'd)

for federal funds to do the job of providing mass transit," while disability discrimination "would not," Dissenting Op. at 1174, overlooks the Court's recognition that § 666 does not require "any connection between a bribe or kickback and some federal money." 124 S. Ct. at 1945.

In his view, "conditional funding grants are no less regulatory than any form of federal regulation of the states." Dissenting Op. at 2. On this point, however, *College Savings* teaches otherwise, and it is worth repeating that opinion's key passage here:

> As we have held in such cases as *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take. . . . These cases seem to us fundamentally different from the present one [about regulation under the Lanham Act]. . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.

527 U.S. at 686-87, 119 S. Ct. at 2231-32.

IV

We hold that WMATA waived its immunity from suit under the Rehabilitation Act by accepting federal transportation funds, and that Congress had authority under the Spending Clause to condition the receipt of federal funds on such a waiver. The judgment of the district court is therefore

Affirmed.

Appendix A

SENTELLE, Circuit Judge, dissenting:

The majority holds that the Washington Metropolitan Area Transit Authority ("WMATA"), an entity created pursuant to an interstate compact among Maryland, Virginia, and the District of Columbia that possesses Eleventh Amendment immunity, *see Morris v. WMATA*, 781 F.2d 218, 219-20 (D.C. Cir. 1986), has waived its immunity pursuant to 42 U.S.C. § 2000d-7 by accepting federal transportation funds. It also holds that this waiver and section 504 of the Rehabilitation Act, which together subject WMATA to private damages suits for employment discrimination on the basis of disability, represent a valid exercise of Congress's power to appropriate money to "provide for the common Defence and general Welfare of the United States" as applied in this case. U.S. Const. art. I, § 8, cl. 1. In my view, the second holding contravenes the principle that "Congress' authority is limited to those powers enumerated in the Constitution, and . . . those enumerated powers are interpreted as having judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 1633, 131 L. Ed. 2d 626 (1995).

I would hold that conditioning acceptance of federal transportation funds on a state's acquiescence to private damages suits for disability discrimination in employment is not a valid exercise of Congress's power under the Spending Clause under the rule of *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 2423-24, 120 L. Ed. 2d 120 (1992), and *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S. Ct. 2793, 2796, 97 L. Ed. 2d 171 (1987). I would further hold that this step is not within Congress's

enforcement power under section 5 of the Fourteenth Amendment.

I would reverse the judgment of the district court for the reason that Congress lacks the power to subject states, or entities like WMATA treated as states for purposes of immunity, to suits for money damages for disability discrimination in the manner it has done here.

A. *Spending Clause*

With all respect, I disagree with the majority that Congress has the power under the Spending Clause to expose the states to liability for the sort of suit Barbour brought against WMATA. "Congress may attach conditions on the receipt of federal funds," but "[s]uch conditions must (among other requirements) bear some relationship to the purpose of the federal spending." *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 2423-24, 120 L. Ed. 2d 120 (1992) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2796, 97 L. Ed. 2d 171 (1987)) (internal quotation marks omitted). That relationship is a nexus between the condition imposed and the "federal interest in particular national projects or programs" represented by the grant of funds. *Dole*, 483 U.S. at 207, 107 S. Ct. at 2796 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S. Ct. 1153, 1164, 55 L. Ed. 2d 403 (1978)).

The *Dole* principle is fundamental to our constitutional structure. Without it, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167, 112 S. Ct. at 2423-

24. As the Supreme Court explained in the only case in which it struck down an Act of Congress as exceeding Congress's Spending Clause authority, it is implausible to presume that

> the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.

United States v. Butler, 297 U.S. 1, 78, 56 S. Ct. 312, 324-25, 80 L.Ed. 477 (1936).

True, a state can simply decline to accept a conditional funding grant, but such grants are no less regulatory simply because acceptance is optional. The offer of funds creates an incentive to comply with the regulation regardless and therefore represents a direct and real attempt by the federal government to regulate even if the condition is declined. In this respect, conditional funding grants are no less regulatory than any form of federal regulation of the states. Direct regulations threaten penalties; conditional funding grants threaten to withhold rewards. There is no functionally significant distinction between the two sorts of inducements as to their *regulatory* character (though of course, as the majority points out, there are *other* differences, like those

pointed out by the Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-87, 119 S. Ct. 2219, 2231-32, 144 L. Ed. 2d 605 (1999)).[1] The germaneness requirement of *South Dakota v. Dole* and *New York v. United States* is therefore essential to maintain some semblance of the Framer's original framework of a federal government of limited and enumerated regulatory power.

There is no reasonably close relationship between the grant of funds here and the imposed condition. The purpose of the federal funds WMATA receives is to subsidize the mass-transit services WMATA provides. They are transportation funds. As applied in this case, the condition is subjecting WMATA to a private suit for money damages for discriminating against its employees on the basis of disability. Prohibiting disability discrimination in employment is simply not "Necessary and Proper," U.S. Const. art. I, § 8, cl.18, to

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1. My point is that the two sorts of powers are equally *regulatory*, and therefore that the *Lopez* principle applies to Spending Clause conditions with full force, not that there are no functional differences between the two. *College Savings Bank* recognizes that Spending Clause conditions differ from direct regulations under Congress's other Article I powers in that the latter are coercive. 527 U.S. at 686-87, 119 S. Ct. at 2231-32. The point, again, is that both are equally regulatory.

In any event, my disagreement with the majority in no way turns on this dispute over this aspect of Congress's Spending Clause power. The majority assumes that there are limits to that power. The core of our disagreement is whether Congress's disapproval of disability discrimination is enough of a connection between the transportation funds and the condition imposed here. In my view, it is not.

spending money for mass transit. The effect of such a prohibition is to create an entitlement for the disabled, perhaps a laudable goal, but not one necessary or proper to providing mass transit.

Barbour's brief offers no answer to this argument. The government and the majority make an attempt to fill this gaping void in Barbour's case. However, I am not convinced that the connection they assert between the funds and the condition here is constitutionally adequate.

Following the government and several other circuits, the majority asserts that Congress's judgment that "it did not want *any* federal funds to be used to facilitate disability discrimination" in employment is enough of a connection between the condition here and the mass-transit funds. Maj. op. at 1168. This cannot be right. The majority and the government are saying that the legislature can identify something a state does that it does not like — in this case, discriminate on the basis of disability — and condition *any* grant of funds on a state's not doing that act any more, assuming the condition is otherwise constitutionally valid. Presumably, Congress has an "interest" in preventing states from doing anything with its funds that it does not like, and there is nothing magical about disability discrimination that makes the "interest" in preventing it distinctively federal. If such an "interest" were enough to sustain such legislation, that would leave the Spending Clause without any "judicially enforceable outer limit[ ]." *Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633. In a system in which the federal government's powers remain limited and enumerated, such an argument must fail.

The reasoning of the circuits the majority cites is no better. The First Circuit's reasoning consists of a single sentence, to wit, that the condition "is manifestly related to Congress's interest in deterring federally supported agencies from engaging in disability discrimination." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) (citing *A.W. v. Jersey City Public Schools*, 341 F.3d 234 (3d Cir. 2003)). As discussed, however, the proper test under *Dole* and *New York* is whether the condition is germane to the interest in the "*particular* national project[ ] or program[ ]," *Dole*, 483 U.S. at 207, 107 S. Ct. at 2796 (emphasis added), not whether Congress has a generalized "interest" in imposing the condition. For the reasons I have stated, the condition here fails the *Dole* test as properly understood. The Third and Ninth Circuits' reasoning essentially tracks the reasoning of the First Circuit. *See A.W.*, 341 F.3d at 243-44; *Koslow v. Pennsylvania*, 302 F.3d 161, 175-76 (3d Cir. 2002); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002).

Nor do I think that the majority's holding follows from the three Supreme Court cases it cites. The majority relies heavily on *Lau v. Nichols*, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974). *Lau* was a class-action suit brought against San Francisco Unified School District officials for violating regulations promulgated by the Department of Health, Education, and Welfare pursuant to Title VI of the of the Civil Rights Act of 1964, which prohibited state programs or activities that receive federal funds from discriminating on the basis of race, color, or national origin. *Id.* at 566, 94 S. Ct. at 788. The regulation required the school district, "[w]here inability to speak and understand the English language excludes national origin-minority group children

from effective participation in the educational program offered by a school district, [to] take affirmative steps to rectify the language deficiency." *Id.* at 568, 94 S. Ct. at 789. Plaintiffs claimed that the school district had not given 1,800 students of Chinese ancestry language instruction, and therefore violated this regulation. The Court, per Justice Douglas, held that this regulation was a valid exercise of Congress's spending power, as the schools received federal educational funds. *Id.* at 569.

Quoting dicta from *Lau*, the majority states that "[s]imple justice requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." Maj. op. at 1170 (internal quotation marks and citation omitted). The principle the majority quotes from *Lau*, which was itself a quotation from a floor speech given by Senator Hubert Humphrey during the debates on the Civil Rights Act of 1964, is obvious dicta, and singularly unpersuasive dicta at that. A policy argument made in a floor statement by a Senator cannot be the basis of a legal doctrine meant to restrain the very exercise of policy-making power such an argument represents. Racial discrimination, in fact, was not at issue in *Lau* at all; it was a challenge to a regulation that prohibited national-origin discrimination. Neither *Lau* nor the Supreme Court's description of *Lau* in *New York v. United States*, 505 U.S. at 167, 112 S. Ct. at 2423-24 is, as the majority implies, authority for the notion that Congress may condition any appropriation on a state's agreeing to *any* "nondiscrimination" rule, because in *Lau* the school district's failure to provide language instruction to foreign-born students bore an obvious relation to the federal educational

appropriations the school district received. In this case, there is no such relationship.[2]

Equally distinguishable is the Supreme Court's recent decision in *Sabri v. United States*, __ U.S. __, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004), also cited by the majority. In *Sabri*, the Court held that conditioning federal funds on criminalizing bribery of officials of state entities that receive at least $10,000 in federal funds was a valid exercise of Congress's Spending Clause power. The Court reasoned that there was a generalized interest linked to all particular federal appropriations in preventing local officials from being bribed, because "bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value," *id.* at 1946, and because "Congress was within its prerogative to protect spending objects from the menace of local administrators on the take," *id.* at 1947.

This unexceptional recognition of the link between any federal appropriation and the federal government's interest in ensuring that such an appropriation is not "frittered away in graft," *id.* at 1946, falls far short of establishing the same

2. My point is not that the federal funds must be specifically appropriated for classroom instruction, but that the condition imposed on receiving the funds must be necessary and proper to providing education, regardless of how broad the educational programs financed by the funds are. That was true in *Lau*. Because prohibiting disability discrimination is not necessary and proper to providing mass transit, *Lau* is not applicable. The majority's explanation that "[n]othing in *Lau* suggested that the federal funds were, or had to be, intended for classroom instruction rather than, for example, the acquisition of equipment or the construction of athletic facilities," Maj op. at 1169, does not speak to this point.

sort of link between "discrimination" generally and any federal appropriation. As with graft, of course, the federal government may not like discrimination; but preventing graft ensures that funds are spent for the particular purposes for which Congress appropriated them, as opposed to any congressional purpose or "interest" whatsoever. Rampant bribery of WMATA officials, for example, would make it more difficult for federal funds to do the job of providing mass transit.[3] So far as I can see, and so far as the government and majority's reasoning goes, discrimination against WMATA's employees on the basis of disability would not.[4]

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3. This is the reason the Court did not need to require a connection between the bribe and the federal money: *any* bribe, the Court reasoned, bears a relation to the particular purpose of a grant of funds (whether it be mass transit, education, or mushroom subsidies). Bribed officials are untrustworthy regardless of the reason the government appropriates the funds. Thus, my distinction of *Sabri* does not, as the majority states, "overlook[ ]", Maj. op. at 1170 n.9, the fact that the Court did not require this connection. To the contrary, it explains why the court did not require it.

4. The majority's attempt to assert a particular connection between mass transit and disability discrimination is that "discrimination 'fritter [s] away' federal funds . . . just like the graft discussed in *Sabri*," Maj. op. at 1170, and it is doubtful. The Supreme Court's point in *Sabri* was that bribed officials divert funds toward the source of the bribe to advance their own personal financial gain, necessarily away from the congressionally specified purpose for spending the funds. The fact that such officials are untrustworthy in this way therefore gave the Court a reason, apart from Congress's judgment that it did not like graft, to think that such a condition was necessary and proper to providing any federal funds.

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Appendix A

The final Supreme Court case cited by the majority, *Grove City College v. Bell*, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984), did not involve the Spending Clause at all, but instead was a First Amendment case, *id.* at 575, 104 S. Ct. at 1222.[5] It therefore sheds little light on the issues here.

For all of these reasons, I conclude that Congress lacks the power under the Spending Clause to subject WMATA to suits for money damages for disability discrimination in employment.

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There is no reason to believe that a similar diversion or lack of trustworthiness, and therefore, a similar connection to the federal funds, occurs when officials discriminate on the basis of disability against their employees. Discriminating on the basis of disability has nothing to do with "wasting" or "diverting" mass transit funds. To the contrary, requiring WMATA to pay money damages for such discrimination affirmatively depletes its transportation funds. There is therefore no reason, apart from Congress's judgment that its money should not finance activities it believes morally opprobrious, to think that the disability discrimination "fritters away" funds the way graft does. A judgment that an activity is morally wrong is not a connection between a condition and the funding program under the *Dole* test.

5. While the majority says that the Supreme Court in *Grove City* "treat [ed] the spending power" and implies that the reason this is so is because *Grove City* cited *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), a Spending Clause case. Maj. op. at 1169. The reference quoted by the majority was in fact a part of the First Amendment analysis, not a delineation of the reach of the spending power.

B. *Section 5 of the Fourteenth Amendment*

My conclusion as to Congress's power under the Spending Clause requires me, unlike the majority, to reach whether Congress has the power to do the same pursuant to its enforcement power under section 5 of the Fourteenth Amendment. I would hold that it does not.

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Although the power to "enforce" seems by its terms to be limited to legislation to remedy actual Fourteenth Amendment violations, *see Tennessee v. Lane*, __ U.S. __, 124 S. Ct. 1978, 2009-10, 158 L. Ed. 2d 820, (2004) (Scalia, J., dissenting), the Supreme Court has held that "Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 121 S. Ct. 955, 962-63, 148 L. Ed. 2d 866 (2001) (internal quotation marks and citation omitted). Those enforcement steps that reach beyond the scope of the Fourteenth Amendment's substantive guarantees, however, "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997)).

Here, as was the case in *Garrett*, the constitutional right Congress is attempting to enforce is Barbour's Fourteenth Amendment right to be free from irrational discrimination in employment on the basis of his disability. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 3257-58, 87 L. Ed. 2d 313 (1985). The question becomes, then, whether subjecting WMATA to suits for money damages for disability discrimination on the basis of his employment is a "congruent and proportional" remedy for Barbour's right. As the Supreme Court held in *Garrett*, that requires me to examine whether "Congress identified a history and pattern of unconstitutional discrimination . . . against the disabled" to justify the need for such a remedy, 531 U.S. at 368, 121 S. Ct. at 964-65, in particular, a pattern of state discrimination not "rationally related to a legitimate governmental purpose," *Cleburne*, 473 U.S. at 446, 105 S. Ct. at 3257-58.

While I confess not to have engaged in a comprehensive independent review of the history of Rehabilitation Act section 504 and § 2000d-7(a)(1), the evidence that Barbour cites at least seems to fall woefully short of demonstrating anything approaching a widespread pattern of unconstitutional discrimination against the disabled by the states in general or WMATA in particular. (The government's brief does not address the section 5 issue, only the Spending Clause issue.) Barbour cites evidence before Congress that he claims demonstrates that "States were not serving the most severely disabled" as of 1973, the year the Rehabilitation Act was passed. Br. for Appellee at 26. That falls far short of establishing the pattern *Cleburne* requires.

Moreover, the remedies created by the Rehabilitation Act against the states "raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*." *Garrett*, 531 U.S. at 372, 121 S. Ct. at 966-67. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity receiving Federal financial assistance," 29 U.S.C. § 794, without regard to whether such conduct has a rational basis. This "accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of" providing benefits to all persons regardless of their disabilities. *Garrett*, 531 U.S. at 372, 121 S. Ct. at 966-67. The remedies authorized by the Rehabilitation Act, in short, sweep far beyond what is constitutionally permissible.

I realize that the Supreme Court recently upheld Title II of the Americans with Disabilities Act as a valid exercise of Congress's section 5 enforcement power in *Tennessee v. Lane*, __ U.S. __, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). But this case is not like *Lane*. It is instead very much like *Garrett*, in which the Supreme Court held that Congress exceeded its enforcement power under Title I of the ADA by subjecting states to suits for money damages for disability discrimination in employment. 531 U.S. at 373-74, 121 S. Ct. at 967-68. Title I concerns discriminating against the disabled in employment; *Lane*, in contrast, involved Title II, which prohibits discrimination against the disabled in public services, programs, and activities. *See Lane*, 124 S. Ct. at

1996 (Ginsburg, J., concurring). That broader scope meant that the constitutional rights Title II of the ADA purported to "enforce" in *Lane* concerned, in addition to *Cleburne*-style irrational discrimination, "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review," for example, the right of access to courts, *id.* at 1988. This case, in contrast, only involves, as discussed, Barbour's right to be free from irrational discrimination. Barbour's employment discrimination suit is more like a Title I than a Title II action. And as noted, Barbour has not shown that his suit for money damages is justified by the need to remedy a widespread pattern of state infringement of his right to be free from irrational employment discrimination.

In sum, I would hold that subjecting WMATA to suits for money damages for disability discrimination in employment exceeds Congress's power under section 5 of the Fourteenth Amendment. Because Congress had no power either under the Spending Clause or under the Fourteenth Amendment to authorize Barbour's suit for damages, I would hold that WMATA is immune under the Eleventh Amendment from the suit. I would accordingly reverse the judgment of the district court and remand the case with instructions to dismiss the suit for lack of jurisdiction.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MARCH 27, 2003

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-0344 (TFH)

ADAM BARBOUR,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court on the Motion for Clarification Pursuant to Federal Rule of Civil Procedure 60(a) filed on behalf of the Washington Metropolitan Area Transit Authority ("WMATA").[1] On May 24, 2002, the Court

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1. In relevant part, Rule 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Fed. R. Civ. P. 60(a).

issued a Memorandum Opinion and an accompanying Order, which granted WMATA's motion for summary judgment in part.[2] Neither the Memorandum Opinion nor the Order directly addressed WMATA's argument that its Eleventh Amendment immunity bars plaintiffs claim brought under section 504 of the Rehabilitation Act, 29 U.S.C. § 794. In the instant motion, WMATA asks the Court clarify its ruling, taking into consideration WMATA's argument of Eleventh Amendment immunity.[3]

I. Sovereign Immunity under the Eleventh Amendment

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This provision has come to mean that each state is a sovereign entity in this country's federal system, and that no state is amenable to suit brought by an individual citizen in federal court without the state's consent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). Sovereign immunity is not absolute, however. Congress may

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2. The Order was entered on the Court's docket on May 28, 2002.

3. When a defendant raises, and the Court rejects, its immunity defense; the defendant may file an appeal of that decision immediately. *See KiSKA Construction Corp. v. WMATA*, 167 F.3d 608, 610 (D.C. Cir. 1999).

abrogate states' sovereign immunity, and a state may waive its sovereign immunity.[4]

A. Abrogation of States' Sovereign Immunity by Congress

The Fourteenth Amendment to the United States Constitution in relevant part provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall deprive a person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S, Const. amend. XIV, § 1. Congress has the "power to enforce, by appropriate legislation," the foregoing provisions of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5.

It is § 5 of the Fourteenth Amendment which grants Congress the authority to abrogate the states' sovereign immunity without the states' consent. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)) ("when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate Eleventh Amendment without the States' consent"). Congress may effect the abrogation of states' Eleventh Amendment immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional

4. Sovereign immunity does not bar suits by individuals against a state for prospective injunctive relief. *See Seminole Tribe*, 517 U.S. at 73; *see Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

authority.'" *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001) (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). If legislation enacted pursuant to § 5 of the Fourteenth Amendment exceeds the scope of protections offered in § 1, that legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to the end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding unconstitutional Religious Freedom Restoration Act as applicable to the states for exceeding Congress' authority under § 5 of the Fourteenth Amendment). Courts, not Congress, define the substance of constitutional guarantees. *Id.* at 519-24 (declaring that Congress only can provide remedies for rights recognized by courts; it can neither create new rights nor expand existing rights).

1. Congress unequivocally expressed its intent to waive the states' sovereign immunity with respect to claims brought by individuals under the Rehabilitation Act.

In order to determine whether Congress has abrogated the states' sovereign immunity, the Court first must determine whether Congress unequivocally expressed its intent to do so. *Seminole Tribe*, 517 U.S. at 55.

In *Atascadero*, before the Supreme Court was the following issue: whether California is subject to suit for alleged violations of section 504 of the Rehabilitation Act brought by a person who claimed to have been denied employment as a graduate student resident because of his partial blindness. *Atascadero*, 473 U.S. at 240. Section 504 of the Rehabilitation Act provides:

Appendix B

> No otherwise qualified individual with a disability in the United States, as defined in [29 U.S.C. § 706(20)], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. The Supreme Court held that the Rehabilitation Act, although presumed to have been enacted as an exercise of Congress' authority under § 5 of the Fourteenth Amendment, "does not abrogate the Eleventh Amendment bar to suits against the States."[5] *Atascadero*, 473 U.S. at 246. Its provision for remedies for violations of the Rehabilitation Act only generally authorized suits against the states in federal court. The Supreme Court reasoned that Congress did not manifest an unmistakably clear intent to condition the mere receipt of federal funds on the states' waiver of sovereign immunity. *Id.* at 247.

In response to the Supreme Court's holding in Atascadero, Congress enacted the Civil Rights Remedies Equalization Act, codified at 42 U.S.C. § 2000d-7. *See Lane v. Pena*, 518 U.S. 187, 198 (1996). In relevant part, 42 U.S.C. § 2000d-7 provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States

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5. In *Atascadero*, the parties conceded that the Rehabilitation Act was enacted pursuant to the Fourteenth Amendment. *See Atascadero*, 473 U.S. at 244 n.4. *In dicta*, the Court stated that, if the Act were viewed as an enactment pursuant to the Spending Clause, U.S. Const. art. I, § 8, there was no indication of the state's consent to federal jurisdiction by accepting federal funds and participating in programs funded under the Rehabilitation Act. *See id.* at 247.

> from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794].

42 U.S.C. § 2000d-7(a). By enacting this legislation, Congress sought to provide the sort of unequivocal waiver that precedent demands. *See Lane*, 518 U.S. at 198. This Court finds that Congress' intent to abrogate the states' sovereign immunity with respect to claims brought by individuals under section 504 of the Rehabilitation Act is clear and unequivocal. *See id.*; *see also Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 169-70 (3rd Cir. 2002), *cert. denied*, __ U.S. __, 2003 WL 650500 (2003).

2. Congress acted pursuant to a valid grant of constitutional authority.

A statement of Congress' clear and unequivocal intent to waive the states' sovereign immunity alone does not effect the abrogation of immunity. Next, the Court must consider whether Congress acted pursuant to a valid grant of constitutional authority. *See Garrett*, 531 U.S. at 363.

In *Garrett*, at issue was a provision which purported to waive the states' sovereign immunity with respect to claims brought by individuals under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq*. The ADA's abrogation provision in relevant part states:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court

> of competent jurisdiction for a violation of [the ADA].

42 U.S.C. § 12202. The Supreme Court began its analysis by identifying the scope of the constitutional right at issue: the limitations that § 1 of the Fourteenth Amendment placed upon the states' treatment of disabled persons. Relying on analogous precedent, the Court affirmed that aged, disabled, mentally ill, and infirm persons are not "quasi-suspect" classes for purposes of the Equal Protection Clause, and that the states' treatment of those persons is subject to rational basis review. *Id.* at 366 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). Classification of such persons "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 367 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). The Supreme Court concluded that the Fourteenth Amendment does not require states to make special accommodations for disabled persons, as long as the states' actions with respect to such persons are rational. *Id.*

The Court next examined the legislative record underlying the ADA. *Garrett*, 531 U.S. at 368-72. Such a record is required because Congress' authority under § 5 of the Fourteenth Amendment is exercised properly only as a remedy for state transgressions. *See id.* (citing *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640 (1999)) ("it is this conduct then — unremedied patent infringement by the States — that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act");

see Kimel, 528 U.S. at 89 ("Congress never identified any discrimination whatsoever that rose to the level of constitutional violation"). Upon review, the Supreme Court found that Congress failed to identify a pattern of unconstitutional employment discrimination against disabled persons by the states. *Garrett*, 531 U.S. at 368. Even if Congress had identified an impermissible pattern of discrimination, the rights and remedies created by the ADA raised issues with respect to congruence and proportionality. *See id.* at 372. The Supreme Court concluded that Congress in enacting the ADA exceeded its authority to enact appropriate legislation designed to enforce the substantive guarantees of the Fourteenth Amendment.[6] *Id.* at 374.

The Supreme Court did not address in *Garrett* the issue presented in the instant case: whether the Rehabilitation Act was a valid exercise of Congress' legislative authority under § 5 of the Fourteenth Amendment. WMATA argues that Garrett's reasoning must be extended, such that plaintiffs Rehabilitation Act claim, too, is barred. The legislative authority pursuant to which Congress enacted the Rehabilitation Act is not entirely clear. *See, e.g.*, *Frederick L. v. Dept of Public Welfare*, 157 F.Supp. 2d 509, 519 (E.D. Pa. 2001) (citing *Armstrong v. Wilson*, 942 F.Supp. 1252, 1262 (N.D. Cal. 1996)) (*Atascadero* examined whether California could be sued for violations of section 504 of the Rehabilitation Act without determining which of Congress'

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6. The holding in *Garrett* compelled this Court to dismiss Plaintiff's ADA claim against WMATA. Because WMATA enjoys Eleventh Amendment sovereign immunity conferred to it by its signatories, a private citizen cannot recover monetary damages under the ADA from WMATA by means of a lawsuit brought in federal court.

powers were exercised in enacting it). Although some courts have held that the Rehabilitation Act is a valid exercise of Congress' legislative authority under § 5 of the Fourteenth Amendment, the parties do not present, nor does the Court identify, precedent on this issue that is binding on this Court.[7]

7. For example, at least two Circuits have held that Congress did *not* act pursuant to a valid grant of authority when it attempted to abrogate the states' Eleventh Amendment immunity for purposes of Rehabilitation Act claims against a state. On remand from the Supreme Court, the Eleventh Circuit held that both plaintiffs ADA claim and her Rehabilitation Act claim were barred by the doctrine of sovereign immunity. *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 261 F.3d 1242, 1244 (11th Cir. 2001). The Eleventh Circuit subsequently vacated this decision in part on other grounds, and remanded the case in part for the district court to consider the argument that defendants have voluntarily waived their Eleventh Amendment immunity under § 504 of the Rehabilitation Act. *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 276 F.3d 1227, 1229 (11th Cir. 2001). On remand, the district court held that the state did not waive sovereign immunity by accepting federal funds. *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 223 F.Supp. 2d 1244 (N.D. Ala. 2002).

In *Clark v. State of California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, 524 U.S. 937 (1998), the Ninth Circuit held that Congress unequivocally has expressed its intent to abrogate the States' immunity under both the ADA and the Rehabilitation Act. California was subject to suit under the Rehabilitation Act, however, because the state waived its sovereign immunity by accepting federal funds. In the alternative, the Ninth Circuit held that the state is not immune from suit because Congress, acting pursuant to § 5 of the Fourteenth Amendment, abrogated the states' sovereign immunity with regard to the Rehabilitation Act. Later, the Ninth Circuit acknowledged that its alternative holding in Clark was questionable in light of the Supreme Court's holding in *Garrett*. *See Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 819 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 2591 (2002).

Given the unsettled state of the law on this issue, the Court is not persuaded that the Eleventh Amendment sovereign immunity presents an absolute bar to plaintiffs Rehabilitation Act claim against WMATA.

B. Waiver of Sovereign Immunity by the State .

Generally, courts find that a state waives its sovereign immunity either if the state voluntarily invokes federal court jurisdiction, or if the state clearly declares its intent to submit itself to federal court jurisdiction. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999); *see Pennhurst State Sch. and Hospital v. Halderman*, 465 U.S. 1 (1981) (state's consent to suit must be "unequivocally expressed").

1. Express Waiver of Sovereign Immunity

A finding of an express waiver requires that a state statute or constitutional provision "specify the State's intention to subject itself to suit in federal court," *Atascadero*, 473 U.S. at 241 (emphasis in original), and that the statute or provision states "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1973) (citations omitted); *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990). The instant civil action involves no express waiver of sovereign immunity by WMATA's signatories.

Appendix B

2. Constructive Waiver of Sovereign Immunity by Acceptance of Federal Funds

When Congress provides federal funds to the states, Congress may impose conditions on states' acceptance of those funds. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Waiver of a state's sovereign immunity is one condition that Congress may impose. *See College Savings Bank*, 527 U.S. at 686-87 (allowing Congress to condition exercise of Article I power on states' agreement to relinquish Eleventh Amendment immunity); *see also Alden v. Maine*, 527 U.S. 706, 755 (1999) ("the Federal Government [does not] lack the authority or means to seek the States" voluntary consent to private suits"); *see also Pennhurst State Sch. and Hospital v. Halderman*, 451 U.S. at 17 (noting that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions").

A state may waive its immunity by voluntarily participating in federal spending programs where Congress expressed a clear intent to condition receipt of a federal benefit or federal funds on the State's consent to waive immunity. *See Atascadero*, 473 U.S. at 247; *Shepard v. Irving*, 204 F.Supp. 2d 902, 916 (4th Cir. 2002). The state's mere receipt of federal funds is not sufficient to constitute a waiver. *See Edelman*, 415 U.S. at 673. The funding statute must "manifest a clear intent to condition participation in the programs funded . . . on a State's consent to waive its constitutional immunity." *Id.* Furthermore, the conditions must be unambiguous, so that the states knowingly exercise choice. *See Atascadero*, 473 U.S. at 247 (citing *Pennhurst*

State Sch. and Hospital, 451 U.S. at 17). In assessing whether a state has made a knowing and intentional waiver of its sovereign immunity, the Supreme Court instructs that "every reasonable presumption against waiver" is to be indulged. *College Savings Bank*, 527 U.S. at 682 (internal quotation marks omitted).

Courts have recognized that 42 U.S.C. § 2000d-7 is a clear expression of Congress' intent to condition states' acceptance of funds on the states' waiver of sovereign immunity. *See, e.g., Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000), *cert. denied*, 543 U.S. 949 (2001); *cf. Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875-76 (5th Cir. 2000) (in enacting 42 U.S.C. § 2000d-7, Congress successfully conditioned receipt of federal funds under Title IX on state's waiver of Eleventh Amendment immunity). Further, courts have held that states have waived their sovereign immunity by their acceptance of federal funds, rendering those states subject to suits brought by individuals under the Rehabilitation Act in federal court. *Koslow*, 302 F.3d at 172 (state waived Eleventh Amendment immunity to Rehabilitation Act claims in accepting federal funds under State Criminal Alien Assistance Program); *Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002) (Kansas waived sovereign immunity by voluntarily accepting federal funds under Rehabilitation Act); *Carten v. Kent State University*, 282 F.3d 391, 398 (6th Cir. 2002) (citing *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626, 628 (2001), *cert. denied*, 122 S.Ct. 2588 (2002)) (Rehabilitation Act claim was not barred by Ohio's sovereign immunity because Ohio unambiguously waived its sovereign immunity when it agreed to accept federal funds); *Douglas v. California Dep't of Youth*

Auth., 271 F.3d 812, 819 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 2591 (2002) (sovereign immunity does not bar a Rehabilitation Act claim because state accepted federal funds; court did not reach the question of whether Congress validly abrogated states' sovereign immunity for purposes of the Rehabilitation Act); *Jim C.*, 235 F.3d at 1082 (state waived sovereign immunity with respect to suits under the Rehabilitation Act by choosing to participate in a federal spending program); *Stanley v. Litchter*, 213 F.3d 340, 344 (7th Cir. 2000) (holding Rehabilitation Act enforceable in federal court against recipients of federal largess); *see Sandoval v. Hagen*, 197 F.3d 484, 493-94 (11th Cir. 1999) (describing 42 U.S.C. § 2000d-7 as clear waiver of state sovereign immunity in exchange for federal funds), *rev'd on other grounds*, 532 U.S. 275 (2001); *Shepard*, 204 F.Supp. 2d at 919 (university knowingly waived sovereign immunity by accepting federal funds; so Rehabilitation Act claim not barred); *Federov v. Bd. of Regents for the University of Georgia*, 194 F.Supp. 2d 1378, 1387 (S.D. Ga. 2002) (through its receipt of federal funds, Board of Regents waived its Eleventh Amendment immunity, so that former student allowed to pursue his Rehabilitation Act claim); *Doe v. State of Nebraska*, 2002 WL 225907 at *8 (D. Neb. Feb. 14, 2002) (state waived Eleventh Amendment immunity with respect to Rehabilitation Act claims by its acceptance of federal funds for social services); *cf. Litman v. George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (holding that in 42 U.S.C. § 2000d-7 Congress successfully conditioned receipt of federal funds under Title IX on state's waiver of Eleventh Amendment immunity); but *see Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 113-14 (2nd Cir. 2001) (although 42 U.S.C. § 2000d-7 is

statement of Congress' clear intent to condition acceptance of federal funds on state's waiver of sovereign immunity, state's receipt of federal funds not indicate that state "actually relinquish[ed] its right to sovereign immunity so as to make the consent meaningful"); *but see Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 223 F.Supp. 2d 1244, 1251 (N.D. Ala. 2002) ("nothing in the Rehab[ilitation] Act [makes] it absolutely clear to State agencies that if they continued to accept federal dollars, they would waive their Eleventh Amendment immunity").

WMATA acknowledges that it receives millions of federal dollars annually from the Federal Transit Administration for construction and capital improvements. *See* Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, p. 26; *see* Defendants Reply to Plaintiffs Opposition to Motion for Summary Judgment, pp. 12-13. In the absence of authority binding on this Court on this issue, the Court relies on case law from other Circuits in support of plaintiff s Rehabilitation Act claim against WMATA on the theory that its acceptance of federal funds constitutes a waiver of sovereign immunity from suits brought by individuals in federal court under the Act.

Accordingly, plaintiff s Rehabilitation Act claim against WMATA may proceed. A Order consistent with this Memorandum Opinion will be issued separately.

Appendix B

s/ Thomas F. Hogan
THOMAS F. HOGAN
Chief Judge, United States District Court
for the District of Columbia

DATE: March 27, 2003

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED SEPTEMBER 1, 2004

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 03-7044 **September Term, 2004**

00cv00344

Adam Barbour,

Appellee

v.

Washington Metropolitan Area Transit Authority,

Appellant

United States of America,

Intervenor

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

Appendix C

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Linda Jones
Linda Jones
Deputy Clerk